In the Supreme Court of the United States

OCTOBER TERM 1967

No. 21

In the Matter of the Estate of
PAULINE SCHRADER, Deceased

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,

Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased,

Appellees.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLANTS

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OPINIONS BELOW

The opinion of the Circuit (probate) Court of Multnomah County, Oregon, was delivered orally, was not reported officially or unofficially, and appears herein at R. 9-11.

The opinion of the Supreme Court of Oregon is reported at 243 Or. 567, 412 P.2d 781 (R. 14). The further opinion on rehearing is reported at 243 Or. 592, 415 P.2d 15 (R. 35).

JURISDICTION

The Order Noting Probable Jurisdiction was entered by this Court on May 8, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTE INVOLVED

Directly involved in this appeal is the constitutional validity of Section 111.070, Oregon Revised Statutes, Volume I, page 856, which was enacted as Chapter 519, Oregon Laws 1951 (p. 900) and is commonly referred to as Oregon's reciprocal inheritance rights statute. This by its terms repealed and replaced Oregon's previous, original reciprocal inheritance rights statute, Section 61-107, Oregon Compiled Laws Annotated, which had been enacted as Chapter 399, Oregon Laws 1937 (p. 607). Inasmuch as the earlier reciprocity cases, material to this appeal, were under the original statute, it is deemed meet to set forth both statutes here for convenient reference and comparison.

Section 111.070, ORS:

> "(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamen-

tary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such an alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

Section 61-107, O.C.L.A.: [repealed in 1951 by ORS 111.070]

"The right of aliens not residing within the

United States or its territories, to take personal property or the proceeds thereof in this state by descent or inheritance, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property or the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens, and upon the right of citizens of the United States to receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such foreign countries. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the state of Oregon, as provided by law in those cases where a person shall die intestate without heirs."

The provisions of the Constitution of the United States involved in this case are:

In Article I, Section 8, entitled "Powers of Congress," the clauses:

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

"To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or officer thereof."

In Article I, Section 10, entitled "Limitations upon powers of states," the clauses:

"No State shall enter into any Treaty, Alliance or Confederation; * * *

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; * * *

"No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power * * *."

In the Fourteenth Amendment, Section 1, entitled "Citizenship; privileges and immunities; due process; equal protection," the clauses:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[as published in Vol 5, Oregon Revised Statutes, at pp. 1140, 1141, 1145-6].

QUESTIONS PRESENTED

The fundamental question presented in this case may be stated as follows:

1. May the State of Oregon, may any individual state of the Union, enact statutes restricting or taking away inheritance rights in estates within its borders from *some, but not all* nonresident aliens, the application of such statutes being dependent upon whether the officials and/or the courts of such state deem and find that the country of which the alien heir or beneficiary is a citizen or resident meets the terms and conditions laid down by the state for

granting, restricting or denying rights of inheritance to nonresident aliens?

This fundamental question may be broken down into the following subsidiary questions:

2. Where the interpretation and application of such a statute result in granting their rights of inheritance to nonresident alien heirs or beneficiaries residing in some foreign countries, and in taking away and escheating to the state the rights of inheritance of nonresident heirs or beneficiaries residing in other foreign countries, depending on whether the state's terms and conditions as laid down in the statute are deemed to have been met by the foreign country in question, does such a statute invade the exclusive power of the Federal Government to regulate the foreign relations of the United States?

3. Specifically, should Section 111.070, Oregon Revised Statutes, [Oregon's so-called reciprocal inheritance rights statute] as interpreted and applied by the State of Oregon, be declared invalid and given no effect because:

a.) it is repugnant to Article I, § 10 of the Constitution of the United States, in that its application results in an unlawful invasion by the State of Oregon of the exclusive power of the Federal Government to regulate the foreign relations of the United States?

b). it is repugnant to Article I, § 8 of the Constitution of the United States in that its application results in an unlawful invasion by the State of Ore-

gon of the exclusive power of the Federal Government to regulate the foreign commerce of the United States?

c.) it is repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it deprives persons residing in the Soviet-occupied zone of Germany of their property without due process of law?

STATEMENT OF THE CASE

This litigation is a controversy between the State of Oregon and the next of kin and heirs at law of Pauline Schrader, deceased, to determine whether her heirs are entitled to distribution of her modest estate or if it should be escheated to the State of Oregon. However, several basic principles of domestic and international law as well as important constitutional questions are involved, and the determination of this case will have very far-reaching impact not only in the State of Oregon but throughout the land.

The facts are simple and not in dispute.

The Facts

Pauline Schrader, a resident of Portland, Oregon, died there, intestate, on September 30, 1962. She was a widow, had and left no issue, she was a naturalized American citizen, and left an estate appraised at $17,764.72, consisting of real property, that is her modest home, appraised at $4500, the rest in savings

and other personalty. Her next of kin and heirs are the appellants, a brother, sister, four nieces and nephews, all residing at or near decedent's native town not far from Leipzig, situated in the Russian-occupied zone of Germany. Over the years since 1945 this region has also been called and variously referred to as East Germany, the German Democratic Republic (GDR), the Deutsche Demokratische Republik (DDR), the Russian Zone, the Eastern Zone or the Soviet Zone of Germany. In this proceeding appellants have used "Soviet Zone" because they deem that most accurately descriptive of that portion of Germany occupied and administered pursuant to agreement of the Allied Powers by the armed forces of the U.S.S.R. since the end of the World War II hostilities.

The State of Oregon, acting through the State Land Board of Oregon [composed of the Governor, Secretary of State and State Treasurer], represented by the state's Attorney General, filed a Petition for Finding and Order of Escheat (R. 2) in the probate court, alleging that the decedent's heirs—then not yet definitely identified—resided in "East Germany," that they were not eligible to take without proof of the existence of the rights required under the provisions of ORS 111.070, that such rights do not exist "with respect to East Germany," that there are no heirs eligible to take and praying that the whole estate, that is the "clear proceeds" thereof, be escheated to the State of Oregon.

The heirs, appellants herein, countered with a Pe-

tition to Determine Heirship (R. 3) setting forth their identities and relationships as the decedent's heirs, their residence at and since Pauline Schrader's death in the "so-called Eastern or Soviet Occupied Zone of Germany," and claiming that they were entitled to take under the provisions of Article IX, paragraph 3 of the Treaty of Friendship, Commerce and Navigation between the governments of the United States of America and of the Federal Republic of Germany signed at Washington on October 29, 1954, effective July 14, 1956 [7 UST 1839; TIAS 3593; 278 UNTS 3] reading as follows:

> "3. Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a period of at least five years in which to dispose of it."

The heirs alleged further that by reason of said treaty provision ORS 111.070 had no application to their right to inherit and to receive distribution of the estate.

In its Answer to said Petition (R. 7) the State Land Board of Oregon admitted existence of the 1954 treaty between the United States and Germany but prayed that the court find that said treaty "has no application to residents of Eastern Germany" and again demanded the escheating of the whole estate to the State of Oregon.

In their Reply (R. 9) the heirs alleged that ORS 111.070 "is in violation of the existing policy of the federal government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States of America; that therefore said statute is invalid and should be given no effect by this Court."

There were extended court hearings at the conclusion of which the probate judge rendered an oral opinion (R. 9) holding that because of the territorial limits set forth therein the 1954 treaty did not apply to "the people in East Germany," the court's rationale being that

> "There are and have been since 1949 two separate and distinct governments controlling what used to be a unified Germany. There is, as we know, the government of the Federal Republic of Germany with which the 1954 Treaty was made, and there is the government of the German Democratic Republic that is the satellite of Communist Russia." (R. 10)

The court further held that the 1923 treaty between the United States and Germany (TS 725, 44 Stat. pt. 3, pp. 2132, 2150) was not applicable because "It was abrogated long before the times in which we are interested." (R. 10)

On the constitutional issue of the reciprocity statute's questioned validity raised by the heirs' reply the court said that this "is without merit in view of the

decision of the United States Supreme Court in the case of *Clark* v. *Allen*, 331 U.S. 503, 91 L. Ed. 1633," adding that

> "If the rules of law announced in that case should be changed because of changed conditions in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court." (R. 11)

Accordingly the court directed and there was entered an order escheating the entire estate to the State of Oregon (R. 11).

On appeal to the Supreme Court of Oregon, that court affirmed the ruling against applicability of the 1954 treaty to "residents of East Germany" (R. 19, 33) but held that under *Clark* v. *Allen* the 1923 treaty was applicable to them in respect to real property (but not personal property) and modified the probate court's order of escheat to the extent that the heirs were entitled to inherit the real property (R. 30, 31, 34).

To the constitutional issue the Supreme Court devoted less than a page of its opinion, rejecting appellants' contentions and pleadings for reexamination of the question with the statement that

> "This argument was also put to bed by *Clark* v. *Allen, supra.*" (R. 30)

The court did not comment on Mr. Justice Douglas' statement in his dissent in *Ioannou* v. *New York*, in which Mr. Justice Black concurred, [371 U.S. at 33] that

"The question seems substantial and does not seem to be foreclosed by *Clark* v. *Allen*, 331 U.S. 503."

In a brief further opinion (R. 35) appellants' petition for rehearing was denied.

SUMMARY OF ARGUMENT

While it is recognized that laws of inheritance are traditionally and properly within the competence of the individual States, a state statute which in its interpretation and application by state courts impairs the exercise of the Nation's foreign policy or invades the exclusive federal power to regulate the foreign relations of the United States must be held invalid and given no effect. Such a statute is repugnant to several provisions of the Constitution of the United States.

As will be demonstrated below, § 111.070, Oregon Revised Statutes, Oregon's so-called reciprocal inheritance rights law, as interpreted and applied by the Oregon Supreme Court, and of course by the probate courts of that state, is such a statute. Its legislative purpose and effect is to require foreign nations to conform to the terms and conditions laid down in the statute to make their citizens and nationals eligible to inherit from Oregon estates. Failure to so conform results in depriving the nonresident alien heir of his inheritance, in the confiscation thereof by escheat to the state if no other heir eligible to take exists outside the proscribed foreign country.

Some ten other states, including most notably California and Montana, have similar reciprocal inheritance rights statutes pursuant to which many inheritances, some of very substantial value, have been taken away from the foreign heir or testamentary legatee and diverted to other, so-called "eligible" heirs, or taken by the states through escheat. In every post-war case the deprived heir or legatee has been in an "Iron Curtain" country, resulting in the development of the "Iron Curtain Rule." In numerous decisions the state courts have indulged in harsh, intemperate, derisive, defamatory, even contemptuous language towards the governments and officials of the foreign countries involved. All this has inescapably affected the foreign relations of the United States.

While any individual state may enact statutes restricting or taking away inheritance rights in estates within its borders from *all* nonresident aliens, it may not lay down terms and conditions under which *some* nonresident aliens may and some may not inherit, depending on whether their country has, in the state court's judgment, met the prescribed terms and conditions.

The regulation of the inheritance rights in the United States of nonresident aliens, because of its impact on the foreign relations and the foreign commerce of the United States, must, if found in the public interest, be exercised only by the Federal Government. As in the case of the "Act of State"

doctrine, most recently declared by this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), such regulation of inheritance rights of nonresident aliens lies exclusively in the federal domain and must be exercised, if at all, by uniform federal law.

This Court's decision in *Clark* v. *Allen*, 331 U.S. 503, assuming *arguendo* that it was correct in 1947, is no longer valid in light of the changed conditions during the past twenty years.

ORS 111.070 is clearly repugnant to Article I, Section 8, Article I, Section 10, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and should be declared invalid and of no effect.

ARGUMENT

Point I

If inheritance rights of nonresident aliens to decedents' estates in the United States are to be restricted, conditioned or otherwise regulated, it must be done by the federal government and by federal law uniform throughout the nation. Individual state action in this field has resulted in chaos and gross injustices as well as transgression into the forbidden field of foreign relations.

It would appear in order to first set forth a brief resume of the legislative history of the statute here involved, that is ORS 111.070, then to show how this statute and its predecessor, § 61-107 Oregon Compiled Laws Annotated, have been interpreted and applied by the Oregon courts. There will follow a similar

review of the legislation and court decisions in the field of reciprocal inheritance rights in some of the other states, primarily California because of the close relationship of the Oregon to the California statutes and because by far the greatest volume of litigation on the subject has occurred in that state.

a. History of the Oregon statute.

Oregon has the doubtful distinction of having been the first American state to enact legislation to curb the traditionally equal rights of nonresident aliens to inherit from decedents' estates in the United States. The 1937 legislature enacted Chapter 399, Oregon Laws 1937 (p. 607) which became § 61-107 O.C.L.A. (set forth at p. 3 supra) and remained in effect until repealed and replaced by ORS 111.070 in 1951. In *Clostermann* v. *Schmidt*, 215 Or. 55, 332 P.2d 1036 (1958), in which the death occurred on April 24, 1945, and the Attorney General of the United States, in his capacity as Alien Property Custodian, tried—unsuccessfully—to vest the inheritance of the German legatee, the Oregon Supreme Court described the purpose of the statute as follows (p. 68):

> "The purpose of § 61-107, O.C.L.A., is clear beyond doubt. It was enacted to assure reciprocal rights of inheritance to American citizens and alien residents or citizens. It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of

Oregon. In re Estate of Krachler, supra (199 Or. at page 457)."

As pointed out in the most scholarly and exhaustive opinion of Mr. Justice Brand in *Krachler (State Land Board of Oregon* v. *Brownell, Attorney General of the United States, and Hagmaier*) 199 Or. 448, 263 P.2d 769 (1953) the Oregon statute, unlike California's Probate Code § 259 enacted in 1941, provided that to meet the reciprocity requirement the foreign country must grant to United States citizens the same rights of inheritance that Oregon law grants to the citizens of that country. The California statute's requirement for reciprocity was (and is today) that the foreign country must grant to American citizens the same rights as to its own citizens, that is there must be no discrimination against American citizens. Also, the Oregon statute by its terms covered only personal, not real property. And there was the so-called "right to receive payment" requirement, that is American heirs had to have the right to "receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such foreign countries." This latter provision was to play a highly important role in the judicial interpretation and application of the statute which, as will presently be seen, have a direct bearing on the foreign relations of the United States.

§ 61-107 O.C.L.A. remained in effect unamended until repealed by Chapter 519, Oregon Laws 1951 (p. 900), set forth verbatim in the Jurisdictional State-

ment at pp. 6 and 7, which became ORS 111.070, set forth at p. 2 infra. There were several significant changes and innovations. Both real and personal property were now covered. The reciprocity requirement in respect to inheritance rights was changed to conform verbatim to California's Probate Code § 259, that is that the foreign country must accord to Americans the same rights of inheritance as to its own citizens, but the "right to receive payment" requirement was retained although it had been taken out of California's PC 259 by a 1945 amendment.

Most importantly, however, there was added to the Oregon statute the so-called "benefit, use or control" requirement which is the essence of the much milder, non-confiscatory statutes adopted by a number of eastern states, such as § 269a of the New York Surrogate's Act enacted in 1939 which was involved in *Ioannou* v. *New York*, 371 U.S. 30 (1962) and on which there will be comment later. And on top of that something not even in the eastern—or any other —statutes on the subject, was added, namely that the foreign heir must receive "the benefit, use or control" of his inheritance from Oregon "without confiscation, in whole or in part, by the governments of such foreign countries." This of course made it necessary for the Oregon courts to inquire into, to consider and to "sit in judgment" on the laws, regulations, administrative policies and other "acts of state" of the foreign governments concerned in respect to foreign valuta received by their citizens from abroad, leading to

a direct involvement in the foreign relations—and the foreign commerce—of the United States.

ORS 111.070 has remained in effect unamended from 1951 to this day.

b. Review of the pertinent Oregon Supreme Court decisions.

It would greatly extend this brief and it is not deemed necessary to here mention and discuss every decision of the Oregon Supreme Court involving § 61-107 O.C.L.A. and ORS 111.070. The discussion will therefore be confined, in their chronological order, to those cases material to the issues in this appeal.

1. *Braun's Estate,* 161 Or. 503, 90 P.2d 484 (1939).

This is mentioned only because it was the first case (date of death July 26, 1937) to reach the court in which the reciprocity statute was involved and the court pointed to the necessity of the alleged German heirs submitting proof that the requirements of the statute were met as of the date of decedent's death.

2. *Estate of Krachler,* 199 Or. 448, 263 P.2d 769 (1953).

The long hiatus between *Braun* in 1939 and *Krachler* in 1953 may be explained by the war years 1941-1945 and perhaps the inclination of the parties and counsel to observe and await the eventual outcome of the reciprocity litigation in California where, because of the greater population and correspondingly

larger foreign colonies, a considerable volume of reciprocity litigation was under way. *Krachler* is primarily of interest here because of the painstaking analysis of the statute, of the "enormous" (p. 504)—and correspondingly enormously expensive—record of evidence required, pro and con, including the inevitable "battle of the experts," to present and try out a reciprocity case, and, most importantly, because it demonstrates the great extent to which the court found it necessary to examine and "sit in judgment" on the laws, ministerial decrees, foreign funds control regulations, court decrees, administrative determinations and other "acts of state" of the German government, the ideologies of the nazi regime, etc. The trial court's ruling for reciprocity and awarding the estate to the Attorney General of the United States under a vesting order was reversed, and the case remanded to the lower court with directions to determine whether the estate should go to the American claimant or to the State of Oregon as an escheat.

3. *Closterman, Exec.* v. *Schmidt*, 215 Or. 55, 332 P.2d 1036 (1958).

This case, previously mentioned to show the purpose of § 61-107 O.C.L.A., also involved reciprocity with war-time nazi Germany with the Attorney General of the United States, as Alien Property Custodian, opposed to the executor and the Attorney General of Oregon who would claim the estate as an escheat—no so-called "eligible" heir having as yet appeared—if the legatee in Germany were found not

entitled to take. The Custodian contended that the decision against reciprocity in *Krachler* was not applicable because the town in Germany where the legatee resided had been occupied and "liberated" by American troops some nine days before the testator's death on April 24, 1945; that this had immediately resulted in the invalidation of the laws, decrees, regulations, etc., imposed by the nazi regime on basis of which the court had ruled against reciprocity in *Krachler;* and that in the liberated areas of Germany the law was restored to what it was prior to the nazi domination. The court rejected this argument, pointing out that the "country" of Germany had to be considered as a whole, that the nazi government was on April 24, 1945, still the ruling government of the country and that no cognizance could be taken of a difference in law in the liberated portions.

> [Parenthetically it may be pointed out that the Court took a different view in this Schrader case where the Court rejected the heirs' argument that the Soviet Zone of Germany was an integral part of the country of Germany and that therefore the law of the Federal Republic, including the 1954 treaty, applied to residents of the Soviet Zone.]

Schmidt illustrates again how deeply the state courts must, in reciprocity cases, inquire into and concern themselves with law of the foreign country, even a portion of the country, in which the alien heirs reside.

4. *State Land Board* v. *Rogers*, 219 Or. 233, 347 57 (1959).

This again was a controversy between the United States Attorney General [William P. Rogers] as successor to the Alien Property Custodian and the State of Oregon, involving the estates of three decedents of Bulgarian origin whose heirs were in Bulgaria and whose rights the Custodian had vested. The deaths occurred in 1940, 1944 and early 1945 respectively so the case was of course under the original reciprocity statute. Up to the time of the oral argument of the appeal the Oregon Attorney General had contended that there existed neither the reciprocal right of inheritance, that is the "right to take," nor the "right to receive," that is the right of American heirs to receive payment within the United States of their inheritance from Bulgarian estates. However, at the oral argument the State conceded the "right to take" [the reasons therefor are not indicated] which left only the question of the "right to receive." All earlier cases had turned on "the right to take," making it unnecessary for the court to concern itself with the "right to receive." (219 Or. at 239)

There was the usual wealth of documentary evidence and expert testimony. The court held that the date of death was also determinative of the second requirement, that is the right to receive (p. 241). The court then proceeded to consideration of the Bulgarian foreign exchange laws and regulations and the expert testimony in respect thereto. Pointing to the necessity of a license to send money out of Bulgaria to the United States, the court said: (p. 245)

> ". . . the fact remains that the ultimate 'right to receive payment' under the Law and Regulations is not a certain one, but depends upon the discretionary will of those who are officials of the Bulgarian National Bank. What the Bulgarian National Bank may have done yesterday, 'as a matter of course,' in the exercise of its powers of discretion, may not be the rule or custom of tomorrow. The condition imposed by § 61-107, O.C.L.A., supra, demands legal certainty of payment, and not a payment dependent upon the whim of any person or institution of the foreign country where the right to take the inheritance originates."

The court affirmed the trial court's decrees escheating the three estates, except for certain real property in one of the estates which was of course not then within the reach of § 61-107 O.C.L.A.

In effect the court undertook to justify the taking by the State of the inheritances of these decedents' heirs in Bulgaria by holding that their rights were destroyed by their government's "act of state," that is the foreign exchange laws and regulations which their government presumably found necessary to impose in the management of its fiscal affairs. More about this in our discussion of *Sabbatino*.

5. *State Land Board* v. *Kolovrat, State Land Board* v. *Zekich*, consolidated for trial and appeal. 220 Or. 448, 349 P.2d 255 (1960). [Reversed sub nom. *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961) on ground of U.S.-Yugoslav treaty]

In these cases the trial court ruled for reciprocity with Yugoslavia and held the decedents' heirs in Yugoslavia entitled to distribution both on the evidence in respect to the existence of reciprocity in fact and by virtue of an 1881 treaty with Serbia in force with Yugoslavia. The Oregon Supreme Court, on appeal by the State Land Board of Oregon, reversed on both grounds, addressing itself, however, as in *Rogers*, supra, only to the second requirement, that is (p. 454)

> ". . . whether there is a certain and enforceable right vested in American citizens to receive the proceeds of a Yugoslavian inheritance in this country."

On the treaty issue, the court saw fit to adopt the very strained construction of the language of Article II of the Convention for Facilitating and Developing Relations of 1881 between the United States and Serbia (22 Stat. 963, Treaty Series 319) (set forth at 220 Or. 463) as urged by the Oregon Attorney General. The court discerned a similarity between that language and this Court's construction of the language of Article IV of the German treaty of 1923 (44 Stat. 2132) in *Clark* v. *Allen*, 331 U.S. 503, and on authority thereof ruled that the 1881 Serbian treaty did not provide for inheritance rights by Yugoslav heirs in estates left in the United States by American citizens. It must be said in candor that the California Supreme Court had similarly construed the 1881 Serbian treaty in *Arbulich's Estate*, 41 Cal. 2d 86, 257 P.2d 433 (1953), in which certiorari was denied by

this Court, 346 U.S. 897, and a petition for leave to file a petition for rehearing was also denied, 347 U.S. 908. It should further be said that although at the date of Arbulich's death on March 21, 1947, a 1945 amendment to the original 1941 statute had eliminated the "right to receive payment" requirement, and had even written in a presumption that reciprocity exists unless the contrary is shown (257 P.2d at 435), the court nevertheless held that "The 'right' to receive the benefits of the inheritance is a necessary and inherent corollary to the 'right' to take by inheritance. One is not separable from the other. The one includes the other. If the right to take exists * * * the right to receive exists. * * *" (p. 440). Furthermore there was in *Arbulich* a detailed analysis of the Yugoslav foreign exchange law and decrees pertaining thereto (pp. 438, 439) at the conclusion of which the court said: (p. 439)

> "But a reading of the entire substance of the documents mentioned makes it apparent that the trial court was justified in reaching the conclusion that under Yugoslav law a citizen of the United States, at the time of decedent's death, had no definitely ascertainable and enforceable right to *receive* Yugoslav property by testament, and that the receipt of any such property would depend in each case upon the largely, if not entirely, uncontrolled discretion of the Minister of Finance. . . ."

The testimony of the Ambassador of Yugoslavia to the United States assuring the court that not only

under the 1881 treaty but regardless of whether or not the treaty was applicable United States citizens had and were accorded "their full, complete and unabridged rights of inheritance to inherit from their relatives or from their estate in Yugoslavia," was dismissed as serving "at most to create a conflict in evidence as to the ultimate fact and is not controlling on the issue of reciprocity" (p. 437).

The court reversed the District Court of Appeal (248 P.2d 179 which had reversed the trial court and ruled for reciprocity), held that the brother in Yugoslavia named as sole beneficiary in the will was not eligible to inherit and awarded the entire estate to another brother in San Francisco whom the testator had specifically disinherited in his will. In the recent case of *Larkin's Estate*, 65 A.C. 49, 52 Cal. Rptr. 441 (1966) (which will be discussed below) holding for reciprocity with the Soviet Union, the California Supreme Court disavowed most of the reasoning and grounds on which—other than the treaty aspect—it had taken away the Yugoslav brother's and beneficiary's inheritance, but that does not console him or redress the great injustice that was done to him. However, it will be seen that the Oregon Supreme Court did have the authority of the California Supreme Court's decision in *Arbulich* to support its rulings in *Kolovrat/Zekich* on both the treaty and the Yugoslav foreign exchange control aspects of the case.

Not raised in *Arbulich* but very strongly urged in *Kolovrat* was the point that Yugoslavia was a sig-

natory to the Bretton Woods Agreement of 1944, a member of the International Monetary Fund, that the Yugoslav foreign funds control laws and regulations were imposed and formulated pursuant thereto, in effect pursuant to a treaty with or at the least an international agreement sponsored by the United States, but the Oregon Supreme Court disposed of that with the following: (220 Or. at 472)

> "The Bretton Woods Agreement gives no support to the thesis of defendants and, to the contrary, is in a large sense on [sic] international recognition that some countries, rightly or wrongly, would impose strictures such as are exemplified by the foreign exchange laws of Yugoslavia and Bulgaria (see State Land Board v. Rogers, supra)."

In the *Kolovrat* opinion there is language which might be construed as disparaging and belittling the words and activities of the diplomatic, consular and other officials of a recognized foreign government. Space does not permit full quotation but the following excerpts from pages 460, 461 and 462 are noteworthy:

pp. 460-461:

> "The record is replete with evidence of remittances from estates in Yugoslavia to persons in the United States and the testimony of Yugoslavian consular representatives and experts called by the defendants concerning the movement of such funds, all offered as proof that American citizens have in the past received their legacies by delivery in the United States. This phase of

the case is further amplified by self-serving declarations of the same tenor from Yugoslavian diplomatic representatives to the State Department and documents emanating from officials in that country . . ."

* * *

pp. 461-462:

"Even if it can be said these items of evidence do reveal a flow of exchange from Yugoslavia to American heirs as of December, 1953, they, at the most, only attest the indulgence of the Yugoslavian authorities as to the American heirs as of that time. * * * The fact that some American citizens were so favored does not preclude wonderment as to how many may have been denied 'the right to receive' or, indeed, whether those who did receive moneys by exchange, received all or only a part thereof * * *."

It may be pointed out that, as will be more thoroughly demonstrated later, the California courts, most recently the California Supreme Court in the *Larkin* case, supra, holding for reciprocity with the Soviet Union, viewed with strong approval the proof submitted of inheritance funds actually received from the USSR by American heirs (52 Cal. Rptr. at 451-452).

That reflections by state courts on the credibility and integrity of diplomatic, consular and other high officials of foreign governments must inevitably embarrass the executive branch and have an adverse effect on the relations of the United States with the offended country cannot be denied and needs no dem-

onstration. It has been shown that the courts of last resort of Oregon and California have widely divergent concepts of what sort of evidence is required to prove reciprocity. Potentially there can be fifty different such concepts if this field is left to individual state action rather than being placed in the federal domain where it clearly and constitutionally belongs.

6. *Mullart* v. *State Land Board*, 222 Or. 463, 353 P.2d 531 (1960).
[Estate of August Kasendorf, deceased.]

This is another war-time case in which the deceased died on November 21, 1943. He left a will naming as beneficiaries a brother and three sisters, the survivors of them or their descendants, all living in Estonia, one of the three Baltic republics annexed by the USSR. All disappeared without trace except one sister Anna. It was established that she died in Estonia "sometime subsequent to the forepart of December 1943". (222 Or. at 481). Her heir was a daughter Damara in Chicago who had fled from Estonia in February 1944, going first to Sweden and eventually reaching Chicago in 1949. To recover this estate Damara had of course to prove the two requirements of § 61-107, O.C.L.A., in respect to Estonia as of November 21, 1943, while the war was at its height, since she would inherit as the successor in interest of her mother, decedent's postdeceased sister. It is not clear if the Russians or the Germans were actually in control of Estonia at the date of Kasendorf's death but that may be immaterial inasmuch as the annexation

of Estonia by the USSR (and its conversion into a republic of the USSR) has never been recognized by the United States.

Evidence of reciprocity was given by the Acting Consul General of Estonia in New York. It was brought out that prior to the invasion of Estonia in 1940, that country had foreign exchange regulations which were in fact (and to a considerable extent are today) quite general and standard in most nations of the world. On the "right to receive payment" requirement the court said: (220 Or. at 479)

> "Because of what we have to say concerning the force and effect of art. XXIV of the Treaty of 1925, we need not particularize our reasons for holding that the Estonian exchange regulations of 1940, like those of Bulgaria and Yugoslavia, stand as a bar to the right of an American heir of an Estonian estate to ultimately and with legal certainty receive payment of his legacy in the United States, as required by § 61-107, OCLA. In re Christoff's Estate, supra (347 P.2d at page 61); In re Stoich's estate, supra (349 P.2d at page 268)".

Continuing from p. 480:

> ". . . But we find that an American's right to receive payment of an Estonian legacy in the United States is not dependent alone on the whims of Estonian officialdom under the exchange regulations of that country. Such an American heir could, if he had been disappointed in that direction, invoke the aid of a United States Consul, resident in Estonia, as provided

by Art. XXIV of the Treaty of 1925, and have that official demand receipt for and transmit to him through appropriate agencies of this government such heir's share of an Estonian estate.

"Art. XXIV of the Treaty of Friendship, Commerce and Consular Rights, signed by the United States and Estonia on December 23, 1925 (44 Stat. 2379) reads:

> 'A consular official of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in the process of probate or accruing under the provisions of so-called Workman's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.'

"The state concedes that this treaty has not been abrogated."

It is not stated what United States Consul was present in Estonia on November 21, 1943, to make such a demand or how he could have made such a demand for an American heir to an estate in Estonia, and then have furnished "to the authority or agency making distribution through him reasonable evidence of such remission." No one would begrudge Damara her eventual inheritance of her uncle August Kasendorf's estate. The point is that this ruling in favor of re-

ciprocity with Estonia is hardly reconcilable with previous rulings against reciprocity with Bulgaria and Yugoslavia or subsequent rulings against reciprocity with Czechoslovakia and the Soviet Zone of Germany.

7. *State Land Board* v. *Pekarek*, 234 Or. 74, 378 P.2d 734 (1963).

The facts in this case are particularly noteworthy. The decedent, Martin Pekarek, was a citizen, resident and domiciliary of Czechoslovakia. For some years before his death he had lived in Portland, Oregon, where he established a savings account with the First National Bank. He left this, also a will in favor of his children in Czechoslovakia, with the bank when, several years before his death, he returned home and rejoined his family in Czechoslovakia. He died there on December 21, 1953, whereafter the Portland bank filed the will left in its custody for probate and, pursuant to its designation therein, the bank was appointed executor by the probate court of Multnomah County, Oregon. The estate consisted solely of the savings account of approximately $7,600.

The Oregon Attorney General filed a Petition for Finding and Order of Escheat denying that the Czechoslovak beneficiaries were eligible to inherit under ORS 111.070 and praying for the escheating of the estate to the State of Oregon. The beneficiaries alleged that the three requirements of the statute were in fact satisfied by Czechoslovakia, furthermore they vigorously contended that under the axiom *lex domicilii decedentis* and the doctrine of *mobilia sequuntur*

personam the money in the bank account had its situs in Czechoslovakia, not Oregon, and that therefore ORS 111.070, being a substantive law of inheritance of the State of Oregon, did not apply thereto. The probate court and, on appeal, the Oregon Supreme Court rejected this contention, holding that: (234 Or. at 77)

> "We are of the opinion that it was the legislative purpose to subject bank accounts to the operation of ORS 111.070."

On the reciprocity issue the heirs produced a certificate by the Ambassador of Czechoslovakia in Washington giving detailed information and assurances that the three requirements of ORS 111.070 were fully met by Czechoslovakia at the time of decedent's death. The Embassy's First Secretary, who was also the Chief of its Consular Division, together with a practicing lawyer from Prague, testified in detail and there was the usual mass of documentary evidence customarily offered in a reciprocity presentation (p. 80). The State of Oregon produced an expert witness who had left Czechoslovakia in 1948 and seemingly did not deeply impress the court but, as the court said (p. 81):

> "The state is handicapped in this class of cases because the iron curtain limits the evidence available to it."

The Supreme Court concerned itself only with subparagraph (c) of subsection (1) of ORS 111.070, that is the third "benefit, use or control" requirement, and then only with the clause thereof that the foreign

heirs must receive the money or property "without confiscation, in whole or in part, by the governments of such foreign countries." After quoting Treasury Department Circular No. 655, Supp. 7 issued under 31 CFR § 211.3 (a) which as of Pekarek's death included Czechoslovakia, as follows: (p. 82)

> " 'The Secretary of the Treasury hereby determines that postal, transportation, or banking facilities in general or local conditions in Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.' "

the court said:

> "This official determination was operative at the date of decedent's death. We regard this official declaration as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation."

Directly on this ground the court affirmed the probate court's decree escheating the estate to the State of Oregon.

Of particular cogency is the following from the penultimate paragraph of the opinion: (p. 83)

> ". . . Assuming, without deciding, that all of the evidence offered by the legatees was admissible, it can be given relatively little weight. The statements of Czechoslovakian officials must be judged in the light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts."

It may be taken as a certainty that this escheating, in effect confiscation, by the State of Oregon of a bank account left in Oregon by a citizen, resident and domiciliary of Czechoslovakia was in itself deeply resented in the chancelleries of Prague and other eastern European capitals. Add to that the aspersions on the officials of those countries and no one could argue with any conviction that a case such as this does not seriously affect the foreign relations of the United States.

8. *State Land Board* v. *Schwabe, admr.*, 240 Or. 82, 400 P.2d 10 (1965).

This case involved reciprocity with Poland as of decedent's death in 1954. Presumably encouraged by the ruling in *Pekarek*, supra, against Czechoslovakia on the basis of its inclusion in Treasury Department Circular 655, the Oregon Attorney General relied on Poland's inclusion in the Circular in 1954. It was

shown that upon conclusion of a debts settlement and other agreements with the United States Poland was removed from the list as of June 7, 1957. Also there was a certificate by the Polish Ambassador similar to that by the Czechoslovak Ambassador offered in *Pekarek.* The following from the court's opinion is directly pertinent: (240 Or. at 83-84)

> ". . . This ban on the sending of Federal checks to Poland was lifted on June 7, 1957. In State Land Board v. Pekarek, supra, 234 Or. at page 82, 378 P.2d 734, we gave this circular prevailing weight over claims of reciprocity made by a certificate of the Ambassador from Czechoslovakia similar to that in evidence here. However, in the instant case there was other evidence which in some measure reflects a respect upon the part of the United States Government for the Government of Poland that in the Pekarek case, at least, we did not find extended to the Government of Czechoslovakia, or to the declarations of its officials. The evidence, it is true, indicates that this reliance by the United States Department of State upon the commitments of the Government of Poland may have developed later than 1954. The evidence was presented by defendants, however, to give greater credence to the certificate of the Polish Ambassador, dated in 1963, than was given to the similar certificate by the Czechoslovakian Ambassador in Pekarek. We think the evidence is entitled to that interpretation and that the certificate may be taken as true. If, as the evidence indicates, the Department of State has reason to accord credibility to the current representations of the officials of the Polish

People's Republic and act accordingly, we see no reason why a state court should, without any reason in fact, disbelieve an official declaration of the Polish Ambassador."

While the rejection of the Oregon Attorney General's efforts to escheat the inheritance of the Polish heirs was most gratifying to the heirs, and no doubt also to the officials of the Polish government, the clear fact is that it happened only because the court chose, for the reasons stated, to give credence to the representations of the Polish Ambassador which previously it had refused to give to the representations of the Czechoslovak Ambassador and other officials of the Czechoslovak government. This we submit, is a glaring example of a state's invasion of the exclusive function of the federal government to regulate the foreign relations of the United States.

9. *Zschernig* v. *Miller*, 243 Or. 567, 412 P.2d 781, 415 P.2d 15.

[Estate of Pauline Schrader, deceased]

The case at bar

This now brings us to a consideration of the case at bar in which invalidation on constitutional grounds of ORS 111.070 is sought. The Oregon Supreme Court's ruling that the 1954 treaty has no territorial application to the Soviet Zone is not being appealed here, nor the ruling that the 1923 treaty continues to have territorial application to the Soviet Zone of Germany. The court did not directly pass upon the issue squarely presented in the trial court as well as on

appeal that all three requirements of ORS 111.070 apply *either* to the country of which the foreign heir is an inhabitant *or* a citizen. Granting for the purposes of this discussion only that the Schrader heirs in the Soviet Zone are not inhabitants, that is residents of the Federal Republic of Germany, that government definitely regards them as having the same *citizenship* as those residing within the territorial limits of the Federal Republic. This is clearly evidenced by the certificate of the Foreign Office issued at Bonn on September 10, 1963, quoted at 243 Or. 567. It then follows that the Schrader heirs are entitled to the inheritance rights provided in Article IX (3) of the 1954 treaty by reason of their citizenship, not their residence, under the alternate provisions of residence *or* citizenship in ORS 111.070. Indirectly, of course, the court rejected this line of argument with the statement that: (p. 575)

> "It is the belief of this court that neither German citizenship nor nationality has real bearing on this issue because territorial application of the 1954 Treaty, by the terms of Article XXVI, is governed by sovereignty. . . ."

But we are not interested in the *territorial* application of the treaty. The Schrader heirs' claim does indeed rest on their *citizenship*, not on whether the treaty applies to the territory where they reside.

The point of all this is that the court has of necessity been obliged to involve itself in highly delicate political questions clearly belonging in the federal domain and with which no individual state of the union

should properly and may constitutionally concern itself. There is a serious transgression into the delicate field of foreign relations which should and can only be entrusted to the executive branch speaking and acting for the nation as a whole.

c. Review of the California reciprocity statute.

It is not deemed necessary to encumber this brief with quotation or extended discussion of the California reciprocity statutes inasmuch as a good deal has already been said and more will be said about them in the review of the decisions pertinent to this case. However, the emergency clause to give immediate effect to the first statute enacted in 1941, is of great interest:

> "A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign

countries to be used for the purposes of waging war that eventually may be directed against the Government of the United States." [Cal. Stats. 1941, ch. 895]

On its face the statute was an attempt by the State of California to usurp, or at least to encroach upon the federal government's exclusive function to protect the nation from its enemies, actual or potential. How aptly indeed the Attorney General of the United States described it in *Bevilacqua's Estate*, 31 Cal. 2d 580, 161 P.2d 589, 593 (1945) as "not an inheritance statute, but a statute of confiscation and retaliation"; and later at page 75 of his brief in *Clark* v. *Allen* as "a recurrent source of diplomatic friction."

The original 1941 statute, § 259, read almost verbatim as the first two requirements of ORS 111.070, that is it covered both real and personal property, required foreign countries to grant United States citizens the same rights of inheritance as their own citizens and that United States citizens have the right to receive payment within the United States of their foreign inheritances. § 259.1 placed the burden of proof on the non-resident alien. § 259.2 provided for escheat if no heirs other than the proscribed alien were found eligible to take. In 1945 the statute was amended by eliminating the "right to receive payment" requirement, taking the burden of proof from the alien heir and providing for a disputable presumption of reciprocity [Cal. Stats. 1945, ch. 1160]. In 1947 the statute was again amended to eliminate the

presumption of reciprocity, in fact as amended the statute was in effect a reenactment of the original 1941 statute except that the "right to receive payment" requirement was not restored [Cal. Stats. 1947, ch. 1042]. The 1947 version has been in effect since then. Never has the California statute contained the "benefit, use or control" requirement which is the third one in ORS 111.070.

For a more thorough discussion of this subject, also of the decided cases, reference is made to Chaitkin, The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents, 25 So. Calif. L. Rev. 297 (1952), cited in Mr. Justice Douglas' dissent in *Ioannou* v. *New York*, 371 U.S. at 32.

d. Review of the pertinent California decisions.

1. *Schluttig's Estate*, 36 Cal. 2d 416, 224 P.2d 695 (1950).

1a. *Miller's Estate*, 104 Cal. App. 2d 1, 230 P.2d 667 (1951).

Space permits mention of only a few cases to demonstrate the chaos and tragic injustices which resulted from leaving the inheritance rights of aliens to the determination of local, parochial tribunals. The classic examples are *Schluttig's Estate*, where, on a great volume of documentary evidence and expert testimony the California Supreme Court ruled against reciprocity with wartime Germany, and *Miller's Estate*, where the District Court of Appeal soon there-

after ruled for reciprocity with wartime Germany on practically the same mountain of evidence and the California Supreme Court denied a hearing.

2. *Arbulich's Estate*, 41 Cal. 2d 86, 257 P.2d 433 (1953) (previous District Court of Appeal decision 248 P.2d 179).

2a. *Estate of Ivan Denis*, Los Angeles County, California, Superior Court No. 282,509.

Mention has heretofore been made of the *Arbulich* case where the brother and beneficiary in Yugoslavia lost his sizable inheritance to a brother in San Francisco in a California Supreme Court ruling against reciprocity, both in fact, and under treaty, although later this Court determined in *Kolovrat* v. *Oregon*, 366 U.S. 187, that inheritance rights of heirs or beneficiaries in Yugoslavia to American estates were assured by Article II of the 1881 treaty with Serbia. There will be pointed out here the comments on the conduct and remarks of the trial judge by the District Court of Appeal whose opinion (at 248 P.2d 179) Mr. Justice Carter of the California Supreme Court adopted as his dissent (257 P.2d at 440). Rather than setting forth here the extensive remarks of the court, it is most respectfully urged that this Court read the opinion starting with "on numerous occasions during the trial" in the lower right column on page 447 of 257 P.2d to "are entitled to great weight" at the middle of the right column on page 448. That eventually the brother in Yugoslavia, so energetically represented by the Consul General of that nation, was deprived of his inheritance must in

itself have been taken as a most serious affront to the country. But how much deeper the resentment over the offensive conduct and language of the trial court! Could this possibly have failed to produce a most adverse effect upon the relations between the United States and the aggrieved foreign nation!

Inasmuch as it is a matter of public record and the writer participated personally and actively in the trial of both cases, it is deemed proper to say here that immediately after the trial of *Arbulich* in San Francisco, there was tried before the Los Angeles County Superior Court the case of the *Ivan Denis* estate, register No. 282, 509, date of death May 9, 1948. In effect the identical evidence in support of reciprocity with Yugoslavia used in *Arbulich*, including the personal appearance and testimony of the Ambassador, was presented in *Denis*. On August 25, 1950, the Honorable Newcomb Condee in an extended memorandum opinion [in which he said "It is doubtful if a more complete record could have been made"] ruled for reciprocity and awarded the estate to decedent's parents and heirs. The Attorney General of California, who had sought the escheat of the estate, did not appeal.

3. *Gogabashvele's Estate*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961).

In 1961 the California District Court of Appeal ruled against reciprocity with the USSR (as of August 14, 1956) in the *Estate of Gogabashvele*, as result of which two children in the USSR of a pre-

deceased sister named as sole beneficiary in his will were deprived of a substantial estate appraised at over $68,000. There was a most voluminous record with the usual mass of documentary evidence and the conflicting testimony of the experts. The opinion abounds with derogatory and disparaging remarks about the foreign country and government involved [see for instance the right column of page 89 of 16 Cal. Rptr.] A particularly intemperate statement is at the middle of the left column on page 90. Surely it requires no proof that such language cannot but have grave repercussions upon the relations of the United States with the country involved, entirely apart from the wound of having one of its nationals deprived of a substantial inheritance! As said by this Court in *Hines* v. *Davidowitz*, 312 U.S. 52 at 64 [quoted by Mr. Justice Douglas in his dissent in *Ioannou*, 371 U.S. at 32]:

> "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."

4. *Estates of Larkin and Terry*, 65 A.C. 49, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).

4a. *Estate of Yarovikoff*, 52 Cal. Rptr. 459 (1966).

Only a few short years later the California Supreme Court solemnly disavowed the reasoning and rationale of practically every ground on which the Russian heirs were disenfranchised in *Gogabashvele.*

On August 2, 1966 (rehearing denied August 31, 1966) there were decided the *Estates of Larkin and Terry*, (also in a few-line companion opinion the *Estate of Yarovikoff)* ruling for reciprocity with the USSR. In these cases there was also a vast record of documentary evidence bearing on the written law and the actual practice of the USSR in matters of inheritance involving citizens of the United States. And there was the inevitable array of experts from both sides of the Atlantic, pro and con. Actually, from the standpoint of the case at bar the opinion is more impressive than the outcome because of the court's admonitions that the contentions made and rulings asked of the court by the state's Attorney General would "imperil the constitutionality of the statute." Quoting from 52 Cal. Rptr. at 456:

> "Moreover, a construction of section 259 which would charge our courts with the duty of assessing the 'democracy quotient' of foreign states and the degree to which they pursue foreign policies consistent with our own would imperil the constitutionality of the statute. In Clark v. Allen (1946) 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, the United States Supreme Court upheld the constitutionality of section 259 against a challenge that it represented a prohibited state venture into the field of foreign affairs. The court rejected as 'farfetched' the contention of the challengers that the California Legislature had undertaken to stimulate foreign states to extend reciprocal inheritance rights to our citizens, a matter clearly within the exclusive competence of the federal government. The court considered

that any effect which the statute might have on foreign countries was merely 'incidental.'

"The commentators have seriously criticized the reasoning of the *Clark* decision. One writer declares that the court 'grossly underestimate[d] the effect of the California statute on foreign relations' and that the decision is inconsistent with prior and subsequent court rulings. (Boyd, The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates (1963) 51 Geo.L.J. 470, 493-500; cf. Hawley, Succession, 1964 Annual Survey of American Law 585, 591.)

"Similarly, Justice Douglas, himself the author of *Clark*, has declared that he believes the time has come to reconsider the rationale of that decision in light of the 'notorious' practice of certain state courts 'in withholding remittances to legatees residing in Communist countries' and thus affecting the foreign relations of this country in a manner not justified by any legitimate state interest in regulating the local aspects of inheritance. (Ioannou v. New York (1962) 371 U.S. 30, 83 S. Ct. 6, 9 L. Ed. 2d 5, per curiam dismissal of appeal, Justices Douglas and Black voting to note jurisdiction, opinion by Justice Douglas.) Whatever the present status of the *Clark* decision, the construction of section 259 for which the Attorney General contends in the present case goes well beyond that deemed 'far-fetched' in *Clark*.

"Accordingly, we conclude that the allusion in *Gogabashvele* to the particular structure and policies of the Soviet Union introduces factors which

section 259 and the United States Constitution exclude from our consideration."

and from page 459:

"Whatever our reaction to the methods of the Soviet Union or to its policies, we must scrupulously confine ourselves to the issues raised by our statute and permit the resolution of questions of foreign policy to rest with the federal government. To allow such considerations to flavor our decision would be to endanger the constitutionality of the statute and unduly to extend the province of this court."

5. *Estate of Chichernea*, 66 A.C. 74, 57 Cal. Rptr. 135, 424 P.2d 687 (3/8/67).

Still more recently the California Supreme Court reversed a Los Angeles County Superior Court and a District Court of Appeal decision (53 Cal. Rptr. 535) against reciprocity with Rumania, closely following its reasoning and holdings in the *Larkin, Terry, Yarovikoff* cases. The date of death was April 15, 1958, and the testatrix' daughter, grandchildren, niece and son-in-law, the beneficiaries under her will, were all citizens and residents of Rumania. Here again the Attorney General of California sought the escheat of the estate on a denial of reciprocity under PC § 259.

Speaking of the Rumanian foreign funds controls and foreign funds control laws and regulations generally, which the state's Attorney General contended [and the Oregon Supreme Court has repeatedly held] rendered American heirs' receipt of foreign inheritance permissive and discretionary rather than a

matter of right, the court said: (57 Cal. Rptr. at 150)

> "The restrictions vary widely in their terms, and many are obscurely phrased. Surely this court cannot undertake to assess the nature and operation of all such restrictions in order to determine which are so onerous as to defeat reciprocity. For us to embark upon any such adventure *would gravely imperil the constitutionality* of section 259 by involving our courts in matters of international monetary policy which may be within the exclusive province of federal authority. (See Ioannou v. New York (1962) 371 U.S. 30, 83 S. Ct. 6, 9 L. Ed. 2d 5 (Douglas, J., dissenting); Kolovrat v. Oregon (1961) 366 U.S. 187, 195-198, 81 S. Ct. 922, 6 L. Ed. 2d 218; cf. Clark v. Allen (1947) 331 U.S. 503, 517, 67 S. Ct. 1431, 91 L. Ed. 1633.)
>
> "In any event, even if we were disposed to reintroduce into the statute *a possibly unconstitutional condition* expressly removed by our Legislature, we could hardly give that condition a more demanding construction than it bore when it was an express part of the Probate Code." (Emphasis ours)

It will be seen, therefore, that the California Supreme Court in both *Larkin* and *Chichernea* directly and seriously questioned the constitutionality of the "right to receive payment" requirement which is subsection (1)(b) of ORS 111.070. It was of course directly on basis of this requirement that the Oregon Supreme Court ruled against reciprocity in *Rogers*, *Kolovrat*, etc., supra, holding that the foreign funds control laws and regulations, adopted by practically

all nations of the world [by no means excepting the United States], "stand as a bar to the right of an American heir of an Estonian estate to ultimately and with legal certainty receive payment of his legacy in the United States. . . ." (*Kasendorf*, supra, 222 Or. at 479). Appellants do therefore have the direct support of the Supreme Court of the State of California in their attack upon the constitutionality of ORS 111.070.

e. Review of Montana reciprocity statutes.

Montana is of interest for two reasons, firstly because in one respect its reciprocity statutes are even more confiscatory than Oregon's and California's, secondly because of extremely intemperate language in some of its Supreme Court opinions.

Section 91-520, Section 2, Revised Code of Montana, 1947, as originally enacted as Ch. 104, Laws of 1939, provided that

> "No person shall receive money or property * * * as an heir, devisee and/or legatee of a deceased person * * * if such heir, devisee and/or legatee, at the time of the death of said deceased person is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country."

This is of course very similar to the "right to receive payment" requirement of ORS 111.070 (1) (b) and the second part of California's original PC 259 as enacted in 1941. The very important difference is that rather than providing for the inheritances of proscribed aliens going to other, "eligible" heirs and for an escheat only if there are no other "eligible" heirs, the Montana statute provided, and still provides, for the escheat of the legacy, devise or distributive share of the ineligible heir or beneficiary. For example, under the Oregon type of statute if the heirs were a brother in the United States and a brother in, let us say Albania, the American brother would receive the whole estate whereas in Montana the Albanian brother's one-half share would escheat to the state.

By Chapter 31, Laws of 1951, the following subsection was added:

> "In order to prove reciprocity the alien heir * * * must establish by competent evidence produced at a hearing to determine heirship; (a) that such foreign country recognizes the right of United States citizens to inherit property left by a deceased person in such foreign country; (b) that such foreign country places no restrictions upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States."

This then introduced the element of reciprocal rights of inheritance and changed, but not materially, the language of the "right to receive payment" requirement to require proof that the foreign country

"places no restriction upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States." Obviously this would include every country which in one form or another exercises foreign funds control and whose currency is not wholly, freely and immediately convertible. The escheat provision was not changed.

The statute was once more amended by Chapter 144, Laws of 1953, but the original 1939 statute plus the 1951 addition were left intact. There were added four sections, the first of which provides that where the proof showed that the alien heir's country recognizes the right of inheritance (of United States citizens) but restricts the movement of money or property out of the country, then the foreign heir's inheritance is to be paid to the State Treasurer in trust subject to the same conditions or restrictions imposed by the foreign country. A very complex recovery proceeding is provided which must be commenced within three years of "the date the trust was created," in absence of which "such trust funds shall forthwith escheat to the state of Montana." Further details are unimportant. In essence the Montana statute since 1953 requires reciprocity of inheritance rights and an American heir's right to immediate, unrestricted payment of his inheritance from a foreign country.

f. Review of the pertinent Montana decisions.

There has not been a great volume of reciprocity

litigation in Montana but what there has been necessitated the heirs, particularly those in the eastern European countries, asserting or defending their rights in the Supreme Court. The opinions are replete with strong language in respect to the "Iron Curtain."

1. In *Stoian's Estate*, 128 Mont. 52, 269 P.2d 1085 (1954), the two dissenting opinions are mild but nevertheless critical of the foreign country's regime.

2. In *Spoya's Estate*, 129 Mont. 83, 282 P.2d 452 (1955) the dissenting opinion spoke so disparagingly of the regime and of the Consul General of the country involved that the majority of the court were moved to apologize in a supplemental statement (282 P.2d at 458) for the inference of the dissent that the foreign heirs' government was irresponsible, concluding with the statement that:

> "Such a possible inference belies the integrity of the diplomatic and economic functions of our Federal Government."

3. In *Ginn's Estate*, 136 Mont. 338, 347 P.2d 467 (1959) the minority delivered a lengthy and unbridled diatribe against the regime and government of the foreign heirs' country (347 P.2d 471-3). Such vitriolic castigation emanating from the highest court of an American state would certainly not go unnoticed at the embassy and in the capital of the offended country, particularly inasmuch as the foreign heirs were represented by their Consul General, and

would certainly not add warmth to the relations between the United States and that country.

4. In *Spehar's Estate*, 140 Mont. 76, 367 P.2d 563 (1961) the trial court, despite two rulings by the Montana Supreme Court in favor of reciprocity with Yugoslavia (*Spoya*, supra, date of death 5/8/49, and *Ginn*, supra, date of death 5/30/55, date of death in *Spehar* 9/13/54) ruled against reciprocity and ordered the legacies of the Yugoslav relatives escheated to the state of Montana. Very fortunately there meanwhile came down the decision of this Court in *Kolovrat* v. *Oregon*, 366 U.S. 187 (5/1/61) holding that reciprocity with Yugoslavia was provided by the 1881 Serbian treaty, which of course resulted in reversal and the Yugoslav legatees eventually receiving their bequests. But it did require an arduous and costly appeal to save their rights and to bring this about.

5. In *Hosova's Estate*, 143 Mont. 74, 387 P.2d 305 (1963) the Supreme Court reversed a trial court ruling against reciprocity with Czechoslovakia. However the date of death was June 10, 1946, so the case came under the original, least demanding 1939 statute and under the Czechoslovak law as it was prior to and for some three years after World War II. Nevertheless the majority opinion (in the right column on page 310 of 387 P.2d) made some rather pointed political observations and in effect voiced a recommendation that a provision like the right to take "without confiscation in whole or in part" requirement of ORS 111.070 be added to Montana's reciprocity statute.

There was one dissent based on previous dissents in *Stoian* and *Spoya* but of particular interest is a specially concurring opinion (at p. 311) in which severely critical sentiments, much more political than judicial, were voiced in explanation of "reluctance and repugnance" to concur in the majority decision.

Here again it was necessary for the foreign heirs to go through an arduous and costly appeal to save their rights from escheat to the State of Montana.

A great volume of reciprocal inheritance rights litigation involving particularly of course the eastern European countries is still pending in the courts of Montana. New cases are constantly arising because of the sizable foreign colonies in that state, composed particularly of ethnically Slavic groups, but if this attack on ORS 111.070 should terminate successfully it may be anticipated that Montana's § 91-520 will likewise eventually fall.

g. Review of reciprocity statutes of other states.

It is not deemed necessary to detail either the statutes or adjudicated cases in other states which have adopted reciprocity statutes such as Oregon's ORS 111.070 or California's PC § 259, which, in the literature on the subject, are usually referred to as the "western" statutes. Most of them have the confiscatory escheat provisions in the event the foreign country does not meet the conditions laid down in the statute or, it may be better said, as the individual probate judges or, on appeal, the higher courts of the

state see fit, at any given time, to interpret and apply the statute. At present a wave of liberal construction seems to flow through the California decisions, but we have seen that it has not always been so and tomorrow's headlines may change the picture completely. The few cases which reach the appellate courts tell only a small part of the story, as pointed out in *Chaitkin's* treatise [supra, 25 So. Calif. L Rev. 297]. Most of the inheritances lost by foreign heirs are far too small to stand the tremendous expense of a full-fledged reciprocity showing, or the inheritances have been lost by escheat before the foreign heirs can —even if able—do something to assert their rights.

Painstaking research has been made in an effort at maximum accuracy but there could conceivably be be an undetected error or omission in the following alphabetical list of other states with reciprocity statutes (as distinguished from the so-called "eastern" statutes providing only for postponement of distribution until it is shown that the foreign heir would have the "benefit, use or control" of his inheritance):

Arizona Rev. Stat. Ann. § 14-212.

Connecticut Gen. Stat. Rev. § 47-57 (real property only).

Iowa Code Ann. § 567.8 (like California's PC § 259).

Nebraska Laws of 1963, c. 21 § 1, p. 104, § 4-107, R. S. Supp. 1965 (like Oregon's ORS 111.070 with ramifications)

Nevada Rev. Stat. §§ 134.230-250 (similar to California's PC § 259).

North Carolina Gen. Stat. § 64-3 (like Cali-

fornia's PC § 259).

Oklahoma Stat. tit. 60, § 121 (personal property only)

Texas Rev. Civ. Stat. art. 167(4) (real property only)

h. Review of reciprocity litigation in other states.

Actually there has been only little contested reciprocity litigation in the states other than California, Montana and Oregon and to analyze and discuss their court decisions would only be cumulative and unduly extend this brief.

i. The so-called "eastern" withholding statutes.

It is also not deemed necessary to discuss the so-called "eastern" statutes — and the court decisions thereunder—which are not in fact confiscatory or punitive in their terms or effect but give the probate judges authority and discretion to withhold and defer actual delivery or payment of inheritances to foreign heirs until the court is satisfied that the foreign heir will in fact receive the full "benefit, use or control" of the money or other property. Typical such statutes are:

New York Surrogate's Court Act § 269 a. (1939).

Pennsylvania Act of July 28, 1953, P. L. 674, section 2, 20 P.S. § 1156 (1953).

New Jersey Stat. Ann. 3 A:25-10 (1953).

Massachusetts Ann. Laws, ch. 206, § 27 a (1955).

Rhode Island Gen. Laws § 33-13-13 (1956).

Maryland Ann. Code art. 93, § 161 (1957).

j. *Ioannou* v. *New York*, 371 U.S. 30, compared to case at bar.

New York's statute has been twice before this Court, firstly *in re Braier*, No. 123, 1953 Term, 305 N.Y. 148, 111 N.E. 2d 424, app. dism. *sub nom. Kalmane* v. *Greene*, 346 U.S. 802, Justices Black, Burton and Douglas voting to note jurisdiction, secondly in *Ioannou* v. *New York*, No. 191, October term, 1962, 11 N.Y.2d 740, 181 N.E.2d 456, appeal dismissed for want of a substantial federal question, dissenting opinion by Mr. Justice Douglas, with whom Mr. Justice Black concurred, 371 U.S. 30. It is therefore deemed advisable to briefly compare *Ioannou* with the case at bar to demonstrate clearly—although such demonstration is hardly needed—that there is in fact little resemblance between the two.

The New York statute, as we already well know, merely defers distribution but does not in any way diminish or take away, much less confiscate, the foreign heir's inheritance. Undoubtedly it had a worthy purpose and accomplished much good during the religious and racial persecutions of the pre-war years of nazi domination of Germany. It can well be argued that the New York courts tortured the statute far beyond its original aims and intents in *Ioannou*. Be that as it may, it has no remote resemblance to Oregon's ORS 111.070 which once and for all and forever takes away the inheritance of the foreign heir found ineligible on just any one of the three grounds [*State Land Board* v. *Pekarek*, supra, 234 Or. at 79, where

the court said that "If the legatees fail to establish any one of the conditions stated in subparagraphs (a), (b) and (c) of subsection (1) the property will escheat to the state."] Oregon's § 111.070 is indeed what the United States Attorney called California's PC § 259—actually far less demanding than Oregon's—"not an inheritance statute, but a statute of confiscation and retaliation." (supra, p. 39).

It may be pointed out that in *Ioannou* the foreign heirs were citizens and residents of Czechoslovakia whereas in the case at bar they are German citizens residing in the Soviet-occupied zone of Germany.

k. *In re Belemecich's Estate*, 411 Pa. 506, 192 A.2d 740 (1963)
Certiorari granted, judgment reversed 375 U.S. 395, on authority of *Kolovrat* v. *Oregon*, 366 U.S. 187.

This case is deemed worthy of special mention because it demonstrates so graphically the temptations which even so mild a withholding statute as Pennsylvania's Act of July 28, 1953 (its so-called "Iron Curtain Act" fully cited supra) offers to local, parochial courts, and even to the highest court of a great state, to indulge in unbridled, intemperate political polemics and name-calling. As on earlier occasions herein we shall refrain from specific citation or quotation, but in fact nearly all the opinion is so vituperative that most any portion or paragraph might have served as basis for a diplomatic protest. Certainly in this instance even the mild Pennsylvania statute has been

interpreted and applied in a manner constituting direct "interference on the part of" a state in international affairs, complete power over which "is in the national government." *United States* v. *Belmont*, 301 U.S. 324, 331, cited in *Ioannou*, 371 U.S. at 31.

1. Conclusion to Point I.

The temptation is great at this point to close this brief in confident belief that it has been amply, glaringly demonstrated that ORS 111.070 as the statute has been interpreted and applied by the courts of the state of Oregon does indeed transgress in an intolerable manner upon the "delicate field" of foreign relations constitutionally forbidden to the individual states and entrusted solely to the Federal Government. We have in fact gone much farther and shown like transgression by at least two other states, California and Montana, and under an analogous but much milder statute, by the State of Pennsylvania. We feel, however, that we must proceed on to two further points, but are determined to limit the discussion to a minimum consistent with what we deem to be our obligation to the Court and the heirs of Pauline Schrader, deceased.

Point II

This Court's decision in CLARK v. ALLEN, 331 U.S. 503 (1943), upholding the constitutionality of the California reciprocal inheritance rights statute is not determinative of the constitutionality of the Oregon statute in light of the events of the past twenty years.

In California, where *Clark* v. *Allen* originated,

the reciprocity litigation involving PC § 259 did not, except for isolated cases such as *Blak's Estate*, 65 Cal. App. 2d 232, 150 P.2d 567 (1944), begin to reach the appellate courts until the late 1940's, after the constitutionality of the statute had been declared in *Clark*. In Oregon the first reciprocity case requiring interpretation and application of the reciprocity statute was *Krachler*, supra, in 1953, where, however, the legislative intent was not discussed. Not until *Closterman* v. *Schmidt*, reviewed earlier herein, decided in 1958, did the Oregon Supreme Court say, in respect to the purpose of the statute that: (215 Or. at 68)

> "It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad as they enjoy in the state of Oregon."

This was in fact tantamount to the State of Oregon proposing to the nations of the world a compact, an agreement that they conform their inheritance laws to Oregon's, whereupon their nationals could continue to inherit in Oregon. The penalty for failure to conform was to bar the foreigners from inheriting in Oregon—in fact not only bar them but the state would (in the absence of "eligible" relatives outside the foreign country) confiscate the inheritances via the vehicle of escheat. This is of course in direct violation of the prohibition in Article I, Section 10 of the U. S. Constitution against any state entering

"into any Agreement or Compact with another State, or with a foreign Power." In fact a state may not in any way communicate or negotiate with a foreign government on any sort of an arrangement.

On the second, the "right to receive payment" requirement, the proposal, perhaps better called a demand, of the State of Oregon was that the foreign country either refrain from adopting, or, if it had adopted, that it abolish any foreign funds controls which might prevent, or perhaps only delay, an American heir receiving remittance of his inheritance from the foreign country. That such controls had been imposed and were being exercised pursuant to an international agreement sponsored by the United States mattered not (*State Land Board* v. *Kolovrat*, supra, 220 Or. at 472, disposing of The Bretton Woods Agreement). The penalty for failure was the same, deprivation of the foreigner's Oregon inheritance.

On the third, the "benefit, use or control" requirement, Oregon's proposal, or demand, was that the foreign country abdicate its sovereign authority to impose upon its own citizens, within its own borders, such limitations as it might deem meet on their "benefit, use or control" of inheritance funds or other property coming to them from estates in Oregon. Once again the penalty for failure to submit to this condition—in fact to submit to any one of the three conditions—was deprivation of the foreigner's Oregon inheritance.

Article I, Section 8 of the U. S. Constitution dele-

gates to the Congress the power to "regulate Commerce with foreign Nations. . . ." The word "Commerce" includes the transmission of funds from the United States to foreign countries and, of course, in the reverse direction. Assuming that the foreign heir's right to inherit from an Oregon estate has otherwise been established, may the State of Oregon then say that the legacy cannot be sent to him, but will be taken from him, perhaps escheated to the state, because the heir's government imposes certain controls on sending inheritance money out of the country, or because it imposes certain restrictions on the heir's "benefit, use or control" of the money after the heir receives it from Oregon? We submit that this clearly constitutes unauthorized interference by Oregon with the exclusive federal power to regulate the commerce of the United States with foreign nations. And further, it constitutes depriving the heir of his property without due process of law in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution.

While ORS 111.070 in its first two requirements is substantially the same as California's PC § 259 was at the time of the decedent's death in *Clark* v. *Allen*, that is in 1942, there was not then in PC § 259—nor has there ever been—the very far-reaching third requirement of ORS 111.070, the right to the "benefit, use or control" * * * "without confiscation, in whole or in part, by the governments of such foreign countries." It was on this requirement alone that the decedent's children in Czechoslovakia lost

their inheritance by escheat in *Pekarek*, supra. Therefore the case at bar involves a far broader, harsher statute than was before this Court in *Clark* v. *Allen*.

By 1947 not a single state court had uttered the intemperate, derisive, defamatory, even contemptuous statements about the foreign governments involved, about the credibility, character and integrity of their officials up to the highest level, with which the cases hereinabove reviewed abound. Nor did this Court, while considering and deciding *Clark* v. *Allen*, have any reason to even suspect, let alone anticipate, that the future course of reciprocity legislation and litigation would be what in fact occurred. As stated in *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 415:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

It may be added that a state statute may be invalidated by the manner in which it is interpreted and applied by the officials and/or the courts of the state. If such interpretation and application results in the state interfering with the exclusive federal power to regulate the foreign policy, the foreign relations or the foreign commerce of the United States, or results in depriving any person of his property without due process of law or in denying any person within its jurisdiction the equal protection of the laws, then the statute is in violation of the Constitution of the United States and cannot be given effect.

As noted in the review of the reciprocity decisions supra, the lower and appellate courts have said time and again, as the trial court and the Oregon Supreme Court said in the case at bar, that they must consider the constitutional validity of the reciprocity statutes settled by *Clark* v. *Allen*. As the probate judge here said after citing *Clark* v. *Allen*: (R. 11)

> "If the rules of law announced in that case should be changed because of changed conditions in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court."

That hour is indeed come. For the reasons stated appellants do urge that this Court reconsider and revise its holding in *Clark* v. *Allen* in light of the events and the change of conditions during the past two decades.

Point III

The "Act of State" doctrine declared in BANCO NATIONAL DE CUBA v. SABBATINO, 376 U.S. 398 (1964) is by analogy applicable to any regulation of the inheritance rights of nonresident aliens in estates in the United States that may be deemed and found to be in the public interest.

It was held in *Terrace* v. *Thompson*, 362 U.S. 197, 218 (1923) that:

> "State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or

> amount to an arbitrary deprivation of liberty and property, or to transgress the due process clause."

This is in support of our proposition that any state may with propriety enact a statute barring *all*, as distinguished from only *some*, nonresident aliens from inheriting within the state. A proper legislative purpose is assumed. However, it was held in *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934):

> "If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

In the discussion under Point II we have shown that the legislative purpose of ORS 111.070 as declared by the Oregon Supreme Court is not only improper but beyond the constitutional power of the state as it directly involves the foreign relations of the United States. That the statute is arbitrary and discriminatory has been demonstrated beyond question. The emergency clause of the original California reciprocity statute, quoted at page 38 supra, on its face declares an improper legislative purpose beyond the state's constitutional power. Inasmuch as Oregon in ORS 111.070, enacted in 1951, adopted California's original statute almost verbatim — adding however the third "benefit, use or control" requirement—the same legislative purpose may be imputed to Oregon's 111.070 that was declared for its prototype in 1941.

It has certainly been demonstrated that this legislative intent to retaliate against and penalize those nations who do not conform to the demands and conditions laid down by the state in the statute has been consistently and persistently carried out by the Oregon Supreme Court in its decisions interpreting and applying ORS 111.070 and its predecessor § 61-107, OCLA. The same applies to Montana as well as California, except possibly for the very recent change of posture indicated in the *Larkin/Terry* and *Chichernea* decisions, supra.

In *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) it was held that no individual state may impose its own construction and its own exceptions upon the "Act of State" doctrine, that the scope of the "Act of State" doctrine must be determined by federal law (p. 427). Not even the Federal Government, much less any individual state, may "sit in judgment" on the laws or other "acts of state" of a sovereign foreign state. As quoted in *Sabbatino* at 416 from *Underhill* v. *Hernandez*, 168 U.S. 250, 252:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

No state of the Union may decide for itself whether or not to give recognition to the foreign funds control

laws and regulations of a sovereign foreign country, or, because of such laws or regulations, penalize residents and nationals of such foreign country by depriving them of rights of inheritance which they would otherwise have in that state. This applies with equal force to any laws or regulations of the foreign country which the officials or courts of the American state might conclude [as the Oregon Supreme Court concluded in *Pekarek*, supra,] constitute "confiscation, in whole or in part," of the inheritance due the foreign heir from an American estate.

Under the "Act of State" doctrine and the law declared in *Sabbatino*, no individual state may lay down and impose its own restrictions and conditions for granting to or withholding from nonresident aliens rights of inheritance within its borders. If conditions be or in the future become such that the rights of inheritance of nonresident aliens should be restricted or regulated, it is a matter of national interest, equally as much to Florida as to Oregon, to Maine as to California, and belongs as much within the scope of the "federal common law" as the "Act of State" doctrine. Just as foreign countries determine the rights of aliens, including rights of inheritance, on a national, nation-wide basis, so such rights must —to remedy and end the chaos which has developed over the past twenty years or more—be determined on a nation-wide basis in the United States by uniform federal dictum in conformity with federal policy and in furtherance of the foreign relations of the

United States. As said by this Court in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) at 63:

> "The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. As Mr. Justice Miller well observed of a California statute burdening immigration: 'If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all of the Union?' "

If any foreign country refuses to grant our citizens rights of inheritance, if it arbitrarily refuses to permit transmission of the inheritances of our citizens from estates within the foreign country although financially able to do so, these are properly subjects for communication between the two governments through the established diplomatic channels. The individual states should not, may not constitutionally enter upon this field. If diplomatic measures fail, the Federal Government has ample means and measures at its disposal—such as, for example—what was done in respect to Cuba whose assets in the United States were "frozen."

BIBLIOGRAPHY

It is deemed unnecessary to extend the discussion further. On the direct application of the principles of law declared in *Sabbatino* to the case at bar, reference is respectfully made to the analysis of and comments on *Sabbatino* by Louis Henkin, Professor of International Law and Diplomacy at Columbia University, in 64 Columbia Law Review 805 (1964), under the title "The Foreign Affairs Power in the Federal Courts."

Reference has heretofore been made (at p. 45, supra) to the exhaustive treatise entitled "The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates" in Vol. 51, p. 470 of The Georgetown Law Journal (1963) by Professor Willard L. Boyd of the College of Law, University of Iowa (now Vice-President for Academic Affairs and Dean of the Faculties at the University of Iowa). Professor Boyd has written extensively on kindred subjects [51 Mich. L. R. 1001 (1953); 47 Iowa L.R. 29 (1961); 47 Iowa L.R. 823 (1962)].

There is of course the treatise by Chaitkin in 25 So. Cal. L.R. 297 (1951-2) mentioned supra. In Vol. 18, p. 329 of the University of Chicago Law Review (1950-51) is "State Regulation of Nonresident Alien Inheritance—an Anomaly in Foreign Policy." Other articles of particular interest are "Soviet Heirs in American Courts," 62 Col. L.R. 257 (1962) by Professor Harold J. Berman of Harvard University who

discusses at length the human element in reciprocity litigation, the personal views, convictions, temperaments and prejudices of the judges, particularly at the first, that is the probate court level, and relates numerous instances where probate judges, by highly uncomplimentary remarks about the governments or officials of the "Iron Curtain" countries, made it clear that their decisions were motivated largely if not wholly by their personal views and sentiments; Comment—"State Reciprocity Statutes and the Inheritance Rights of Nonresident Aliens," Vol. 1963, 315, Duke Law Journal; Ehrenzweig's "Treatise on the Conflict of Laws" where, at p. 668, he points to the "host of inconsistent decisions brought on by the reciprocity statutes" and says that "Only outright abolition of these objectionable statutes can eliminate this expensive and demoralizing confusion"; and Comment—"International Law—Inheritance by Nonresident Aliens in Oregon; the Oregon Statute, the Effect of Treaties and the Federal Law" in the Oregon Law Review, Vol. 65, No. 3, p. 221 which particularly discusses, and criticizes, the decision of the Oregon Supreme Court in this Schrader (*Zschernig* v. *Miller*) case, and points out the relevancy of this Court's decision in *Sabbatino*.

All of the above treatises and comments fully support every contention, proposition and principle of law urged by appellants in this case and argued under the three points in this brief.

CONCLUSION

The decision of the Supreme Court of the State of Oregon should be reversed, the Oregon reciprocity statute Section 111.070, Oregon Revised Statutes, declared repugnant to the cited provisions of the Constitution of the United States and therefore invalid and of no effect, and the heirs of Pauline Schrader held entitled to inherit the whole of her estate, real and personal.

August 23, 1967

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